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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RFA 696/2016 & CM 33412/2016

SIDHARTHA TAYAL Appellant
Through : Mr. Sandeep Garg, Advocate

versus

DINESH GOEL AND ANR Respondents
Through : None.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI

ORDER
% **16.01.2017**

1. The appellant/defendant has assailed the judgment dated 19.5.2016 passed by the learned trial court dismissing his suit for recovery of Rs.10,00,000/- instituted against the respondents/defendants on the ground that he had failed to fulfil the terms of the Agreement to Sell dated 5.4.2010 in respect of a commercial space bearing No.S-15, Second Floor, Cross River Mall, Karkardooma, Delhi (hereinafter referred to as '**the shop**') and therefore, he is entitled to claim double of the earnest money from them.

2. A brief recapitulation of the relevant facts of the case is necessary. The appellant/plaintiff has instituted a suit for recovery against the respondents/defendants, through his father, Shri Sham Tayal, described as his power of attorney holder, stating *inter alia* that on 5.4.2010, he had entered into an agreement with the respondents/defendants through his father, for purchasing the shop. At that time, the respondents/defendants had asserted that they were the absolute owners of the shop. The deal was

finalized for a sum of Rs.36,21,000/-. At the time of executing the Agreement to Sell, earnest money of Rs.5,00,000/- was paid in cash to the respondents/defendants and it was agreed that the balance sale consideration would be paid by the appellant/plaintiff on or before 4.6.2010, at the time of execution and registration of the sale documents, contemporaneous to the delivery of the shop.

3. The appellant/plaintiff claimed that after entering into the aforesaid agreement, the intentions of the respondents/defendants became *mala fide* and they started putting off the matter. On 4.6.2010, the date by which the sale documents were to be executed and registered, the appellant/plaintiff was ready with the balance amount but the respondents/defendants had sought more time on the ground that they were in the process of obtaining necessary sale permission from the competent authorities. After waiting for some time, on 16.3.2011, the appellant/plaintiff got a legal notice served on the respondents/ defendants calling upon them to execute the agreement to sell, but they gave a reply dated 28.3.2011, refuting the contents of the said notice. On receiving a reply from the respondents/defendants, alleging that they had surrendered possession of the suit premises with a *mala fide* intention and deliberately committed breach of the terms and conditions of the Agreement to Sell dated 5.4.2010 for which they were liable to pay double the earnest money, the appellant/plaintiff instituted the present suit on 23.1.2013, praying *inter alia* for recovery of a sum of Rs.10,00,000/- along with interest @ 18% p.a.

4. After the summons were served on them, the defendants filed a common written statement, wherein a preliminary objection was taken seeking rejection of the plaint under Order VII Rule 11 CPC. On merits, the

respondents/defendants admitted to the execution of the Agreement to Sell dated 5.4.2010; to the amount agreed to be paid towards sale consideration, to the receipt of the earnest money and the fact that 4.6.2010 was fixed as the cut off date for execution of the sale deed in respect of the shop. However, they alleged that repeated efforts were made by the Estate Agent who had struck the deal between the parties, to contact him for completing the deal, but the appellant/plaintiff had neglected to pay the balance sale consideration within the stipulated period. When the appellant/plaintiff committed a default in discharging the obligations cast on him, the respondent No.1/defendant No.1 had no option but to forfeit the earnest money.

5. The respondents/defendants clarified that the appellant/plaintiff was informed from day one that the entire building, where the shop was situated, belongs to M/s STC Developers Pvt. Ltd. and for a consideration, the rights of the respondent No.1/defendant No.1 in the said shop could easily be transferred/substituted in favour of his nominee, and as a copy of the Builder-Buyer's Agreement executed by the respondent No.1/defendant No.1 with M/s STC Developers Pvt. Ltd., duly witnessed by the respondent No.2/defendant No.2, had been supplied to the appellant/plaintiff through the Estate Agent on the date of executing the Agreement to Sell, he cannot feign ignorance about the status or title of the shop. The respondents/defendants asserted that it was the appellant/plaintiff who had defaulted and neglected to pay the balance sale consideration within the stipulated period of two months, despite repeated requests. As a result, the respondent No.1/defendant No.1 had no option but to surrender possession of the shop to the principal owner, M/s STC Developers at a considerably

lesser amount which they did on 23.11.2012. Due to this, they suffered a loss of Rs.16,50,128/- as the Builder paid them only a sum of Rs.19,70,172/.

6. It may be noted that the appellant/plaintiff elected not to file a replication to the written statement filed by the respondents/defendants.

7. Eight issues were framed in the suit by the learned trial court. The two main issues framed were with regard to the entitlement of the appellant/plaintiff to recover an amount of Rs.10,00,000/- from the respondents/defendants, being double of the earnest money, along with interest and the onus to prove the said issues was placed on the appellant/plaintiff. Another issue was framed on the aspect of failure on the part of the appellant/plaintiff to file the special power of attorney allegedly executed by him in favour of his father authorizing him to sign, verify and institute the suit. The onus in respect of the remaining issues framed on the basis of the preliminary objections taken by the respondents/defendants in their written statement, was placed on them.

8. After the trial concluded, on examining the documentary and oral evidence of the parties, the trial court arrived at a conclusion that the appellant/plaintiff had failed to prove that he is entitled to recover a sum of Rs.10,00,000/- from the respondents/defendants along with interest. As a result, issues No.(i) & (ii) were decided against the appellant/plaintiff. Issue No.(vi) is pertaining to non-filing of the special power of attorney allegedly executed by the appellant/plaintiff in favour of his father, onus whereof was placed on the respondents/defendants, was decided in their favour.

9. The primary reason that has weighed with the trial court for dismissing the appellant/plaintiff's suit for recovery was the fact that he had failed to demonstrate that the Agreement to Sell dated 5.4.2010 (Ex.P-1/1)

had cast a duty on the respondent No.1/defendant No.1 to obtain a no objection certificate from the departments/authorities for transferring the shop. The relevant clauses of the Agreement to Sell have been reproduced in the impugned judgment and on a bare reading of the clauses, it is evident that no such obligation was cast on the respondent No.1/defendant No.1 to obtain any such clearances, as alleged.

10. Counsel for the appellant/plaintiff contends that the trial court has failed to appreciate that the parties had agreed that the respondents/defendants were required to obtain no objection certificates from the concerned authorities, which they had failed to do, and in the absence of any sanctions from the concerned authorities, the agreement could not go through. He argued that the appellant/plaintiff was all along ready and willing to perform his part of the contract, but the respondents/defendants failed to cooperate.

11. It is an undisputed position that the Agreement to Sell was executed on his behalf, by the father of the appellant/plaintiff. In his cross-examination, the appellant/plaintiff (PW-1) had deposed that he had executed a power of attorney in favour of his father to purchase the shop but all the dealings and conversations relating to the sale had taken place between his father and the respondent No.1/defendant No.1 and he is unaware of the nature of documents that were shown by the respondents/defendants to his father at the time of entering into the agreement. It may be noted that the appellant's father had expired during the pendency of the suit and prior to the stage of evidence. The appellant had further admitted that his plea to the effect that a NOC and prior sale permission were required from the concerned authorities, including the Builder, do not find any

mention in the terms and conditions of the Agreement to Sell and he had volunteered that the same were only verbally settled.

12. On the other hand, in support of their case, the respondent No.1/defendant No.1, who had deposed as DW-1, had produced the Estate Agent, Shri Sanjay Jain as a witness, who had deposed as DW-2. DW-2 had clearly stated that at the time of executing the Agreement to Sell, he had shown all the title documents of the shop to the father of the appellant/plaintiff. Noting that the said witness was not cross-examined at all on this point, the learned trial court had rightly deduced that it was proved that the appellant/plaintiff was conscious of the nature of title that existed in favour of the respondent No.1/defendant No.1 at the time of execution of the Agreement to Sell.

13. Similarly, the respondent No.1/defendant No.1 (DW-1) had stated that there was no obligation cast on him to get any NOC issued from any authority for transferring the shop in favour for of the appellant/plaintiff before executing the sale documents and the mode of transferring the same in his favour was discussed in the presence of the Estate Agent(DW2). The respondent No.1/defendant No.1 relied on the Builder-Buyer Agreement to state that the entire property belonged to STC Developers Pvt. Ltd. and he was entitled to transfer/substitute the shop in favour of his nominee for a consideration, and he was well entitled to sell the shop and execute necessary documents in favour of the appellant/plaintiff which the Builder would have readily endorsed. Pertinently, DW-1 was not cross-examined on the aforesaid aspect at all.

14. Accepting the contention of the counsel for the respondents/defendants that the word “owner” ought not to be interpreted

narrowly and can be construed liberally to include ownership on the basis of a Builder-Buyer Agreement, the trial court held that the respondent No.1/defendant No.1 was entitled to enter into the Agreement to Sell in respect of the shop with the appellant/plaintiff. It was also noted that the very fact that the appellant/plaintiff had impleaded respondent No.2/defendant No.2 (nephew of the defendant No.1) as a co-defendant in the suit, though he was not a party to the Agreement to Sell and no specific relief has been sought against him, was an indication of the fact that the appellant/plaintiff's father was aware of the existence of a Builder-Buyer Agreement because it was the said defendant who was a party to the said agreement.

15. The Agreement to Sell contemplated a target date for completing the sale transaction by 4.6.2010. Having failed to demonstrate from the terms of said document that any obligation was cast on the respondents/defendants to obtain sanctions from the concerned authorities before executing a sale deed in favour of the appellant/ plaintiff, the plea taken by him that the terms of the Agreement were orally modified on a mutual agreement, has been validly turned down by the trial court. The appellant/plaintiff has also failed to prove his readiness and willingness to perform his part of the contract within the agreed timeline. He has not filed any documents or produced any evidence to demonstrate that he had adequate funds available with him at the relevant time for completing the sale transaction, which position was admitted by him in his testimony. The appellant/plaintiff has not disputed that he had never participated in the sale transaction and had no personal knowledge thereof as he had relied on his father to handle his affairs. Pertinently, it was the father of the appellant/plaintiff who had signed the

Agreement to Sell (Ex.PW-1) on his behalf.

16. On evaluating the aforesaid facts and circumstances and the evidence produced by the parties, this Court is of the opinion that the learned trial court has given cogent and valid reasons for arriving at the conclusion that the appellant/plaintiff was not entitled to claim double of the earnest money from the respondent/defendants as he had failed to prove that he was ready and willing to perform his part of the contract or that the Builder-Buyer Agreement referred to and relied upon by the respondents/defendants, had not been shown to his deceased father, who was handling the deal for him at the time of execution of the Agreement to Sell. Dehors the findings returned by the learned trial court in respect of issue No.(vi), whereunder it has been held that the suit instituted by the appellant/plaintiff is bad for non-filing of the special power of attorney, allegedly executed by him in favour of his father, authorizing him to sign the plaint and institute the suit on his behalf, which is only a procedural irregularity, that was curable and was in fact cured later on, this Court is of the opinion that the findings returned in respect of issues No.(i) and (ii) itself are sufficient to non-suit the appellant/plaintiff.

17. It is therefore held that no illegality, arbitrariness or perversity has been pointed out in the impugned judgment for interference in the appeal. The appeal is accordingly dismissed *in limine* along with the pending application, being devoid of merits.

HIMA KOHLI, J

JANUARY 16, 2017/sk/mk/ap